FILED
JAN 28 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-999

In the Supreme Court of the United States

OCTOBER TERM, 1990

DARRYL S. JACOBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the preponderance-of-the-evidence standard applies to factual findings bearing on the application of the "plain view" doctrine.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 5a-27a) is reported at 31 M.J. 138. The opinion of the Air Force Court of Military Review (Pet. App. 1a-4a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 25, 1990. The petition for a writ of certiorari was filed on December 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Beale Air Force Base in California, petitioner, a member of the United States Air Force, was convicted of willfully damaging military property and willfully disposing of military property, in violation of Article 108 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 908; nine larceny offenses involving both military and private property, in violation of Art. 121, UCMJ, 10 U.S.C. 921; and wrongfully opening mail matter, in violation of Art. 134, UCMJ, 10 U.S.C. 934.[1] He was sentenced to confinement for 18 years, a dishonorable discharge, forfeiture of all his military pay and allowances, and a reduction to the lowest enlisted grade. On discretionary review of the sentence, the convening authority reduced petitioner's period of confinement to six years, but otherwise approved the findings and sentence as adjudged at trial. The Air Force Court of Military Review affirmed the findings and sentence approved by the convening authority. On discretionary review, the Court of Military Appeals affirmed.

1. Petitioner and his family resided in a civilian apartment complex in Marysville, California, a short distance from Beale Air Force Base. Petitioner's landlord lived in the same building in an apartment located directly above petitioner's apartment. Pet. App. 7a, 17a; Tr. 195-196. In December 1987, petitioner took leave for about a month while he and his family traveled to Virginia. The landlord was aware of petitioner's absence and noticed that another,

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[1] Petitioner entered a conditional plea of guilty to all 12 charges. Tr. 229; AX 11. Rule for Courts-Martial 910(a)(2), *Manual for Courts-Martial, United States – 1984* (*Manual*), permits a military defendant, with the consent of the government and the approval of the trial judge, to enter a conditional plea of guilty in order to preserve his right to obtain appellate review of adverse rulings on pretrial motions.

unidentified serviceman was residing in petitioner's apartment. Pet. App. 7a. The landlord and his wife detected an odor in their own apartment, but they were unable to identify its origin. Tr. 195. Petitioner and his wife had always maintained their apartment in a neat and tidy condition. Tr. 202.

During petitioner's absence a plumbing emergency arose that required the landlord and a plumber to enter petitioner's apartment. Upon opening the door to the apartment, the landlord saw that it was "trashed." Tr. 194-195. He saw clothing and half-eaten cans of foods scattered about the apartment, as well as a cat's litter box that had not been emptied for some time. *Ibid.* The plumber refused to enter the apartment until the odor dissipated. Tr. 193. From items of military clothing that were scattered about the apartment, the landlord determined that "Bills" was the surname of the unidentified military member that he had seen. Pet. App. 7a.

In an effort to contact Bills, the landlord called the law enforcement desk at the Beale Air Force Base security police squadron and spoke with Staff Sergeant Gary Johnston. Sergeant Johnston was a security police flight chief, and both petitioner and Airman First Class Jeffrey Bills were assigned to his flight. After some hesitation, Sergeant Johnston agreed to examine the apartment the next day when he was off duty. Pet. App. 7a; Tr. 32-33, 43, 197, 204.

Upon entering the apartment with the landlord, Sergeant Johnston saw a number of items that he suspected had recently been stolen from the base. Sergeant Johnston's uncontradicted testimony at trial was that he noted serial numbers on some of the items "that were in plain view." Tr. 40-41; Pet. App. 19a. Sergeant Johnston later verified that the serial numbers matched items that had been reported stolen. This information was subsequently used to obtain a search warrant for petitioner's apartment, which resulted in the seizure of a number of items of stolen prop-

erty. Pet. App. 9a. Petitioner later confessed to having committed the various thefts that formed the basis of the charges against him. AX 1.

2. At trial, petitioner moved to suppress the items seized from his apartment on the ground that Sergeant Johnston's viewing of the items inside his apartment constituted an unlawful search by a government official. AX 2. The trial judge denied the motion, holding that Sergeant Johnston was not acting in an official law enforcement capacity when he entered petitioner's apartment. Tr. 222-223; Pet. App. 7a-9a.

3. Before the Air Force Court of Military Review, petitioner challenged the trial judge's suppression ruling on two grounds. First, he argued that the trial judge erred in ruling that Sergeant Johnston was not acting in an official law enforcement capacity when he entered petitioner's apartment. Second, he claimed for the first time that, notwithstanding Sergeant Johnston's uncontradicted testimony to the contrary, Sergeant Johnston must have moved the items in the apartment in order to see their serial numbers. The court of review rejected both arguments, finding that the serial numbers were in plain view when Sergeant Johnston saw them. Pet. App. 3a.[2]

3. The Court of Military Appeals affirmed by a divided vote. Pet. App. 5a-19a. The majority concluded that Sergeant Johnston was acting in an official capacity when he entered petitioner's apartment; that, in accordance with the terms of petitioner's lease and California law, petitioner's landlord could lawfully enter the apartment in order to make emergency repairs; that petitioner's landlord could also invite Sergeant Johnston to enter the apartment; and that the evidence supported the finding of the court of military review that Sergeant Johnston saw the serial numbers in

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[2] Courts of military review have independent fact-finding authority under Article 66(c) of the UCMJ, 10 U.S.C. 866(c).

plain view without first moving the equipment. *Id.* at 11a-19a. In dissent, Judge Everett concluded that petitioner's landlord and Sergeant Johnston were trespassers and that the sergeant's observations therefore should have been suppressed. *Id.* at 20a-23a.

ARGUMENT

Petitioner argues that the government should be held to the clear-and-convincing evidence standard of proof when relying on the plain view exception to the warrant requirement. Petitioner did not raise that claim in the trial court, in the Air Force Court of Military Review, or in the Court of Military Appeals. Petitioner therefore has not properly preserved his claim. See, *e.g.*, *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[3] In any event, petitioner's belated claim does not warrant review by this Court.

Under the so-called "plain view" exception to the warrant requirement, a law enforcement officer may seize evidence if he has probable cause to believe that it is con-

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[3] For another reason as well, it is not clear that this question is subject to review in this Court. The statutes authorizing this Court to review by a writ of certiorari the judgments of the Court of Military Appeals, 10 U.S.C. 867(h)(1) and 28 U.S.C. 1259(3), restrict this Court's certiorari jurisdiction to "decisions" of the Court of Military Appeals. Section 867(h)(1) of Title 10 further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory authority to limit its decisions in any case to less than all of the questions presented by a defendant. 10 U.S.C. 867(d). Petitioner did not present to the Court of Military Appeals the degree of proof question that he now raises in his certiorari petition. Accordingly, it is not clear that that court rendered a "decision[]" on the question presented in the petition, within the meaning of 10 U.S.C. 867(h)(1).

That question does not require an answer in this case, however, since the question presented in the certiorari petition does not warrant review by this Court in any event.

traband or tied to criminal activity, as long as he does not commit an unlawful search in the process of effecting the seizure. See *Horton* v. *California*, 110 S. Ct. 2301 (1990); *Arizona* v. *Hicks*, 480 U.S. 321 (1987). Since looking at an object in plain view does not amount to a "search," *Arizona* v. *Hicks*, 480 U.S. at 328; *Texas* v. *Brown*, 460 U.S. 730, 740 (1983) (plurality opinion); *United States* v. *Knotts*, 460 U.S. 276, 281-285 (1983); *United States* v. *Lee*, 274 U.S. 559, 563 (1927), or a "seizure," *Arizona* v. *Hicks*, 480 U.S. at 324, Sergeant Johnston did not trigger the Fourth Amendment simply by looking at the serial numbers on the stolen items in petitioner's apartment. At the same time, Sergeant Johnston would have acted unlawfully if he had first moved the items in order to see otherwise unviewable serial numbers, unless he had probable cause to seize the items. *Arizona* v. *Hicks*, 480 U.S. at 326-329. That is where petitioner focuses his claim. Petitioner contends that the government should be required to prove by clear and convincing evidence that Sergeant Johnston did not move the stolen items in order to see their serial numbers. That claim lacks merit.

Neither *Horton* nor *Hicks* adopted that standard of proof for the "plain view" doctrine, and this Court's decisions point in the other direction. The Court has applied the preponderance-of-the-evidence standard in a number of cases in which the defendant sought to suppress evidence under court-created constitutional exclusionary rules. *Lego* v. *Twomey*, 404 U.S. 477 (1972) (voluntariness of a defendant's confession); *United States* v. *Matlock*, 415 U.S. 164, 177-178 n.14 (1974) (voluntariness of consent to search given by a third party); *Nix* v. *Williams*, 467 U.S. 431, 444-445 n.5 (1984) (inevitable discovery of evidence); *Colorado* v. *Connelly*, 479 U.S. 157, 167-169 (1986) (voluntariness of a defendant's waiver of his *Miranda* rights). See also *United States* v. *Hurtado*, 905 F.2d 74 (en banc), supplemented,

909 F.2d 121 (5th Cir. 1990) (voluntariness of consent to search). The Court has also refused to impose a higher burden of proof as an exercise of its supervisory power. *Lego* v. *Twomey*, 404 U.S. at 488 n.16. In these cases, the Court has consistently held that the preponderance standard appropriately balances the government's interest in admitting reliable proof of the defendant's guilt and the defendant's interest in ensuring that court-devised constitutional rules of evidence are properly administered. *Colorado* v. *Connelly*, 479 U.S. at 167-169; *Lego* v. *Twomey*, 404 U.S. at 488-489. See *United States* v. *Matlock*, 415 U.S. at 178 n.14 ("the controlling burdern of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence").

The only case in which this Court has applied the clear-and-convincing evidence standard to the review of investigative procedures leading to the obtaining of evidence in a criminal case arose in connection with an unconstitutional out-of-court eyewitness identification. In that setting, the court held that the government must prove by clear and convincing evidence that it had an independent source for an in-court identification. *United States* v. *Wade*, 388 U.S. 218, 240 (1967). But the *Wade* case is no help to petitioner. This Court has limited that aspect of *Wade* to its facts, refusing to apply the clear-and-convincing-evidence standard to other types of evidence. *Nix* v. *Williams*, 467 U.S. at 444-445 n.5. See *Lego* v. *Twomey*, 404 U.S. at 488-489. *Lego* v. *Twomey*, 404 U.S. at 488, and *United States* v. *Matlock*, 415 U.S. at 178 n.14, also made clear that the preponderance-of-the-evidence standard applies to the admission of evidence allegedly obtained in violation of the Fourth Amendment. *Wade* therefore does not assist petitioner.

Underlying petitioner's argument is the belief that Sergeant Johnson committed perjury in testifying that he did not move any of the items in petitioner's apartment in order to see the serial numbers of the stolen materials. Petitioner's submission reduces to the claim that the clear-and-convincing-evidence standard is necessary in order to prevent that type of police perjury. But that argument is not tied to the "plain view" doctrine, to the Fourth Amendment, or to any other single body of law. Petitioner's argument would require the Court to apply the clear-and-convincing-evidence standard to the testimony of police officers across the board, and, by logical extension, to the testimony of anyone else (including, of course, the defendant himself) who has a motive to lie. No decision of this Court supports such a requirement as a matter of due process, and petitioner has not made a case for it. Under these circumstances, review by this Court of petitioner's claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20320